Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1683

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

WESTERN UNION CORPORATION; TELEPROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN UNION CORPORATION, TELEPROCESSING INDUSTRIES, INC., WESTERN UNION DATA SERVICES COMPANY, INC., WESTERN UNION REALTY CORPORATION, AND GIFTAMERICA, INC.

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Opinions Below

The Decision and Order of the National Labor Relations Board (hereinafter the "Board") issued on June 1, 1976 and is reported at 224 NLRB 274. The Opinion of the United States Court of Appeals for the District of Columbia Circuit issued on February 24, 1978 and is reported at 571 F.2d 665.

Counter-Statement of Question Presented

Whether this Court should review the holding of the Board and the Court of Appeals that Western Union Corporation and its four new subsidiaries do not constitute with The Western Union Telegraph Company a "single employer," that holding being supported by substantial evidence.

Counter-Statement of the Case

The material facts are essentially as stated in the Decision and Order of the Board (Petition at pp. 25a-43a) and Opinion of the Court of Appeals (Petition at pp. 1a-8a).

Petitioner, United Telegraph Workers, AFL-CIO, at all relevant times represented and still represents the production, operations, maintenance, and clerical employees of Respondent The Western Union Telegraph Company (hereinafter "Telegraph"). It seeks to expand its representation status to include the 200 to 300 additional employees of Respondent Western Union Corporation (hereinafter "WUC") and its four new subsidiaries, Teleprocessing Industries, Inc. (hereinafter "TII"), Western Union Data Services Company, Inc. (hereinafter "DSC"), Western

Union Realty Corporation (hereinafter "WURC") and GiftAmerica, Inc. (hereinafter "GA").[1]

In their respective opinions below, the Board and the Court of Appeals extensively discussed the applicable facts and law; they concluded that WUC, the four new subsidiaries, and Telegraph do not constitute a "single employing enterprise." Accordingly, both the Board and the Court of Appeals held that Telegraph's bargaining obligations do not concern WUC or the new subsidiaries.

Telegraph, the oldest of the corporate entities and the only one with which the Petitioner has ever had a bargaining relationship, is engaged exclusively in the business of providing record communications services pursuant to tariff and subject to the regulation of the Federal Communications Commission (hereinafter the "FCC"), as well as state agencies. During the 1960's, Telegraph experienced a marked decline in its traditional telegraph business. In an attempt to offset its declining business, Telegraph explored diversification in unregulated markets. However, upon completion of an intensive study of its charter limitations and FCC restrictions, it concluded that it was limited to the operations of telegraph-related business (Petition at pp. 27a-28a).

Specifically, under Section 25 of the New York Transportation Corporations Law Telegraph is limited to the operation of an electric telegraph business. Moreover, FCC rulings in cases collectively referred to as the "computer inquiry" require that any unregulated, *i.e.*, nontariffed, activities be conducted by separate corporate

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[1] For convenience, these four companies are sometimes hereinafter referred to as the "new subsidiaries."

entities.[2] The FCC's holding was upheld by the U.S. Court of Appeals for the Second Circuit in *GTE Service Corporation* v. *FCC,* 474 F.2d 724 (2d Cir. 1973).

Each of the new subsidiaries entered into a new unregulated business activity, one in which Telegraph was prohibited from acting, and without effecting any change in the operation of Telegraph's business as theretofore and presently conducted. Moreover, the traditional Telegraph bargaining unit remained intact within Telegraph. No Telegraph bargaining unit employee was deprived of Telegraph work or of representation by the Petitioner. Contrary to Petitioner's suggestion (Petition at pp. 4-8), Telegraph's bargaining unit employees were not transferred to the new business (Petition at pp. 34a-35a). Except in isolated instances, the production, maintenance, and clerical employees of the new subsidiaries were hired "off the street."

Petitioner in its unfair labor practice charge asserted that the six corporations constitute a "single employer" for the purpose of collective bargaining, and that these corporations (except Telegraph) had unlawfully refused to recognize and bargain with it in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5). The Board in dismissing the Complaint held that each of the six corporations is a separate and independent entity; that the several corporations do not constitute a "single employer." Accordingly, it held that Telegraph's bargaining obligation relates only to its own employees; that it does not

[2] While focusing primarily on the separation of commercial data processing from the tariffed communications business, the FCC made clear that it was also prohibiting companies from commingling any regulated and unregulated business. 47 C.F.R. § 64.702(g).

extend to employees of WUC or the four new subsidiaries (Petition at p. 42a).

The Court of Appeals affirmed, holding that the Board's findings are "amply supported by substantial evidence in the record" (Petition at p. 3a). Although Chief Judge Bazelon dissented, he agreed that the Board's conclusion that the several corporations do not constitute a single employer is based upon substantial record evidence (Petition at p. 16a).[3]

Reasons for Denying the Writ

1. This case involves no issue of general importance and the Judgment below does not conflict with any holding of the Court below or any other Court of Appeals.

In support of its Petition, Petitioner contends that due to the "manifest public importance of Western Union and of its business," the decision below will constitute "a text for evasion of the Act, unless this Court speaks" (Petition at p. 16). Petitioner also contends that the Judgment below cannot be reconciled with the decision of the same Court in *Local 627, International Union of Operating Engineers* v. *NLRB,* 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in relevant part and remanded on other grounds sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) (hereinafter referred to as *"South Prairie"*). Both arguments are misplaced.

[3] He would remand to the Board to consider whether an "alter-ego" or "successorship" doctrine is relevant (Petition at pp. 11a-12a, 24a) notwithstanding that, as noted by the majority of the Court, the parties "rested their case before the ALJ on the 'single employer' rationale." (Petition at p. 6a, n. 8)

As the Court of Appeals stated in *South Prairie,* "'single employer' status, for purposes of the National Labor Relations Act, depends upon all of the circumstances of the case" (518 F.2d at 1045). The peculiar circumstances involved in the present case ill suit the role of a "text for evasion of the Act," as Petitioner claims. Telegraph could not have embarked upon new, unregulated businesses such as those in which the new subsidiaries engage, and the new subsidiaries could not and do not engage in the regulated business of Telegraph. The operation of WUC and the four new subsidiaries as businesses separate and distinct from Telegraph is required by the New York Transportation Corporations Law and FCC regulations. Under the circumstances, it is difficult to conceive of how the decision below stands as a precedent for use by other employers, except, perhaps, one in the same or similar type of regulated business in which Telegraph is engaged—if any such exist, which is hardly likely.

Petitioner contends that the decision below conflicts with this Court's holding in *South Prairie.* On the contrary, it is in total harmony with that decision. In *South Prairie,* this Court, following its prior decision in *NLRB* v. *Pittsburgh S.S. Co.,* 340 U.S. 498 (1951), refrained from disturbing the holding of the Court of Appeals below on the "single employer" issue, noting that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." 425 U.S. at 804 n. 5, citing *NLRB* v. *Pittsburgh S.S. Co., supra,* at 502. The opinion in *South Prairie* leaves no doubt that the Court of Appeals did precisely what it concluded was required for a determination of "single employer" status, namely, considered "all the circumstances" before holding that the respondents therein, Kiewit and South Prairie,

were a single employer for purposes of the National Labor Relations Act. 518 F.2d at 1047.

Here, the Court of Appeals and Board examined all of the circumstances in light of the "single employer" criteria enumerated in *Radio Union* v. *Broadcast Services of Mobile, Inc.,* 380 U.S. 255 (1965), and made their separate determinations that the "single employer" doctrine does not apply. Those criteria are interrelation of operations, common management, centralized control of labor relations, and common ownership. Here, the Board found that only one of the four elements, common ownership, is present, and as to it, that there is not the "actual or active" control criticized by the Board and the Courts of Appeals. See, *e.g., Gerace Construction, Inc.,* 193 NLRB 645 (1971); *American Federation of Television and Radio Artists* v. *NLRB (Hearst Corporation),* 462 F.2d 887 (D.C. Cir. 1972); *San Francisco-Oakland Newspaper Guild* v. *Kennedy,* 412 F.2d 541, 545 (9th Cir. 1969); *Miami Newspaper Printing Pressmen's Local 46* v. *NLRB,* 322 F.2d 405 (D.C. Cir. 1963); *J.G. Roy & Sons Company* v. *NLRB,* 251 F.2d 771, 773-74 (1st Cir. 1958); *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.),* 185 NLRB 303 (1970), *enf'd,* 443 F.2d 1173 (9th Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972).

The Board and Court holdings below that the mere existence of common ownership does not result in "single employer" status are in accord with the holding in other circuits in which the question has arisen. See, *e.g., NLRB* v. *General Teamster, Warehouse and Dairy Employees, Local 126,* 435 F.2d 288, 291 (7th Cir. 1970); *Bachman Machine Company* v. *NLRB,* 226 F.2d 599 (8th Cir. 1959). Here, the Board also found that none of the other indicia of "single employer" is present, and the Court of Appeals found that the Board's findings are based upon substantial

record evidence. Petitioner points to nothing of substance which indicates the contrary.

South Prairie presents circumstances entirely absent here. There, a non-union employer (South Prairie) was formed for the avowed purpose of undermining the Union's jurisdiction. Its creation threatened the continued Oklahoma operations of the pre-existing unionized counterpart (Kiewit). Here, there is a total absence of anti-union *animus* or purpose in the formation of WUC and the four new subsidiaries.

Another critical factor present in *South Prairie* but here absent is that of common control of labor relations policies.

The Court of Appeals decision in *South Prairie* was a necessary response to a specific fact pattern wholly absent in the instant case. The instant findings and conclusions of the Court of Appeals for the District of Columbia affirming the holding of the Board are consistent with *South Prairie* and the prior decisions of this Court as well as of other Courts of Appeals that have addressed the question. There are no special or important reasons for review.

In sum, the sole issue—whether the several companies shall be deemed to constitute a single enterprise for collective bargaining purposes—has been resolved on the basis of substantial evidence and does not merit review by this Court.

2. The decision below is not in conflict with decisions of this Court prescribing the standards for judicial review of an agency decision.

Although Petitioner further contends that the Court of Appeals below did not properly review the decision of the Board, it points to no specific inadequacy in the review process, and for the good reason that there was none.

Petitioner's contention is that the Board declined to accept the recommendations and conclusions of the Administrative Law Judge. However, Petitioner ignores the fact that the Administrative Law Judge's decision was based on material facts which are no different from those considered by the Board. The differences Petitioner elects to highlight are the Board's analysis and in the inferences drawn by the Board from the facts found by the Administrative Law Judge. But, it is not improper for the Board to draw different factual inferences than those drawn by the Administrative Law Judge, nor to draw different conclusions of law in its application of controlling legal principles. The Board's findings do not detract from the substantial evidence standard, and particularly where, as here, credibility of witnesses was not a significant factor. *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474, 496-97 (1951).

Petitioner's contention that the decision of the Court of Appeals below "is one that does run contrary to the language and tenor of the Act, and is a rubber-stamp affirmance of a Board decision which is inconsistent with the statutory mandates" (Petition at p. 20) is simply unsupported rhetoric inconsistent with the record. Even Chief Judge Bazelon, while dissenting on other grounds, agreed with the majority "that substantial evidence supports the Board's conclusion that the elements of single employer status have not been established" (Petition at p. 16a).

As this Court pointed out in *South Prairie, supra,* Congress has charged the Courts of Appeals with the normal and primary responsibility for granting or denying enforcement of Board orders. 425 U.S. at 803-4. Both the majority and the dissenting opinions in the Court of Appeals leave no doubt that the Court properly exercised and discharged its responsibility in the case *sub judice.* For this reason alone, the Writ should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Dated: July 24, 1978.

Respectfully submitted,

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